

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA**

RAMIA SABHERWAL; DONALD T.H.
SMITH,

Plaintiffs,

vs.

THE BANK OF NEW YORK MELLON
fka THE BANK OF NEW YORK, AS
TRUSTEE FOR THE
CERTIFICATEHOLDERS OF CWALT,
INC., ALTERNATIVE LOAN TRUST
2005-62 MORTGAGE PASS THROUGH
CERTIFICATES 2005-62; AND AS
TRUSTEE FOR THE
CERTIFICATEHOLDERS OF CWALT,
INC., ALTERNATIVE LOAN TRUST
2005-81, MORTGAGE PASS-
THROUGH CERTIFICATES 2005-81
BANK OF AMERICA, N.A.;
MORTGAGE ELECTRONIC
REGISTRATION SYSTEMS INC.;
OCWEN LOAN SERVICING, LLC;
REAL TIME RESOLUTIONS, SELECT
PORTFOLIO SERVICING, INC.; AND
DOES 1 THROUGH 10, INCLUSIVE.,

Defendants.

CASE NO. 3:11cv2874-WQH-BGS

ORDER

HAYES, Judge:

On January 8, 2013, the Court granted the motions to dismiss filed by Defendants, dismissed the first amended complaint without prejudice, and permitted Plaintiffs to file a motion for leave to file a second amended complaint accompanied by the proposed second amended complaint. (ECF No. 55).

1 On February 2, 2013, Plaintiffs filed a Motion for Leave to File Second Amended
2 Complaint. (ECF No. 56). Plaintiffs state:

3 Plaintiffs' proposed Second Amended Complaint, without exhibits, is attached
4 hereto as Exhibit A, expands the claim for Negligence to include the conduct of
5 Defendants related to their handling of three separate attempts to obtain loan
6 modifications and adds claims for: Quasi-Contract; Violation of 12 USC 2605;
7 Violation of 12 USC 1692 et seq.; Violation of California Business &
8 Professions Code section 17200 et seq; Accounting; Violation of California
9 Civil Code section 2924.17(b) and additional facts.... The Negligence and
10 Quasi-contract claims are based on new information that Plaintiffs have learned
11 since the filing of their original complaint.

12 *Id.* at 2-3.

13 On February 25, 2013, Defendants filed oppositions to the Motion for Leave to File
14 Second Amended Complaint. (ECF Nos. 57-61). Defendants contend that the motion should
15 be denied because the proposed second amended complaint was filed without exhibits and the
16 proposed second amended complaint fails to state any claims upon which relief can be granted.

17 On March 3, 2013, Plaintiffs filed a reply in support of the Motion for Leave to File
18 Second Amended Complaint. (ECF No. 62).


19 Federal Rule of Civil Procedure 15 mandates that leave to amend "be freely given when
20 justice so requires." Fed. R. Civ. P. 15(a). "This policy is to be applied with extreme
21 liberality." *Eminence Capital, LLC v. Aspeon, Inc.*, 316 F.3d 1048, 1051 (9th Cir. 2003)
22 (quotation omitted). In determining whether to allow an amendment, a court considers whether
23 there is "undue delay," "bad faith," "undue prejudice to the opposing party," or "futility of
24 amendment." *Foman v. Davis*, 371 U.S. 178, 182 (1962). "Not all of the [*Foman*] factors
25 merit equal weight.... [I]t is the consideration of prejudice to the opposing party that carries
26 the greatest weight." *Eminence Capital*, 316 F.3d at 1052 (citation omitted). "The party
27 opposing amendment bears the burden of showing prejudice." *DCD Programs, Ltd. v.*
28 *Leighton*, 833 F.2d 183, 187 (9th Cir. 1987). "Absent prejudice, or a strong showing of any
of the remaining *Foman* factors, there exists a *presumption* under Rule 15(a) in favor of
granting leave to amend." *Eminence Capital*, 316 F.3d at 1052.

After review of the motion, the proposed second amended complaint and the filings of
the parties, the Court concludes that Defendants have not made a sufficiently strong showing

1 of the *Foman* factors to overcome the presumption under Rule 15(a) in favor of granting leave
2 to amend. *See Eminence Capital*, 316 F.3d at 1052. The Court will defer consideration of any
3 challenge to the merits of the proposed second amended complaint until after the amended
4 pleading is filed. *See Netbula v. Distinct Corp.*, 212 F.R.D. 534, 539 (N.D. Cal. 2003)
5 (“Ordinarily, courts will defer consideration of challenges to the merits of a proposed amended
6 pleading until after leave to amend is granted and the amended pleading is filed.”).

7 IT IS HEREBY ORDERED that the Motion for Leave to File Second Amended
8 Complaint is GRANTED. (ECF No. 56). Plaintiffs shall file the proposed second amended
9 complaint attached to the motion within ten days of the date of this Order.

10 DATED: April 18, 2013

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12 **WILLIAM Q. HAYES**
13 United States District Judge
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